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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY.

MOTION OF NATIONAL COUNCIL OF SENIOR CITIZENS AND CONSUMER FEDERATION OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Council of Senior Citizens and the Consumer Federation of America hereby respectfully move for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari in this case. The consent of the petitioners has been obtained and has been filed with the Clerk of this Court. The consent of the respondent was requested but denied.

The National Council of Senior Citizens is a coalition of organizations throughout the United States representing over 2,500,000 elderly citizens.

The Consumer Federation of America is a federation of national, state, regional and community consumer organizations consisting of 196 organizations in every state, except Hawaii, and the District of Columbia. The Federation was organized and is run to protect consumers. The organizations which are members of the Federation have over 38-million members.

The immediate interest of the National Council of Senior Citizens and Consumer Federation of America arises from the fact that they are appellants in eight actions presently in the United States Court of Appeals for the District of Columbia and the United States District Court for the District of Columbia, in which the controlling question of law is almost identical to that presented for review in the present case. These cases were brought against eight drug companies to recover tens of millions of dollars paid by purchasers for drugs which were found by the Food and Drug Administration to be ineffective.

We respectfully submit that the brief *amici curiae* which the National Council of Senior Citizens and the Consumer Federation of America seek permission to file will materially assist the Court in appreciating the full impact of the decision below and the need for its review.

BRUCE J. TERRIS
HELEN COHN NEEDHAM

Attorneys for
National Council of
Senior Citizens
Consumer Federation of
America

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H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF NATIONAL COUNCIL OF SENIOR CITIZENS AND CONSUMER FEDERATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of the National Council of Senior Citizens and the Consumer Federation of America is described in the Motion for Leave to File Brief Amici Curiae above.

REASONS FOR GRANTING THE WRIT

The National Council for Senior Citizens and the Consumer Federation of America filed eight class actions in the District Court for the District of Columbia on behalf of all purchasers of over 100 specified drugs. These drugs have been found ineffective and ineffective as to combination by the Food and Drug Administration. The class actions seek to recover monies paid by purchasers of these improperly sold drugs from eight drug companies. Each suit is based on identical legal theories. Motions to dismiss were filed in three of the suits[1] and although denied, the cases were ordered transferred to the Superior Court for the District of Columbia, in accordance with 11 D.C. Code 922, because of the named plaintiffs' failure to meet the requisite jurisdictional amount.

Subsequently plaintiffs sought to amend two of these complaints to add Dade County, Florida as a plaintiff and to amend all three of the complaints to add the District of Columbia as a plaintiff. Dade County claims damages in excess of $10,000 in one suit and $50,000 in the other. The District of Columbia claimed damages in excess of $50,000 in each suit. In a memorandum opinion which is attached, the district court denied leave to amend. The court ruled that in an otherwise proper class action federal courts do not have jurisdiction over members of a class who themselves do not possess the jurisdictional amount even though named plaintiffs satisfy the jurisdictional requirements.

The district court's determination was based in great part on the decision of the court below in the present litigation. The district court acknowledged that "[t]he dissent in *Zahn* appears to be the better reasoned view, but in the circumstances the court feels that it is bound by the decided case."

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[1] The remaining five suits were held in abeyance by stipulation.

No purpose is served by the rule espoused by the panel of the Court of Appeals for the Second Circuit and hesitantly followed by the District Court for the District of Columbia. In both the case at bar and the litigation to which amici curiae are parties, all plaintiffs have the identical causes of action and seek the same relief, based on the same course of conduct by the defendants. The only differences between plaintiffs is in the amount of their alleged damage.

In the case presently under consideration, the holding of the lower court gives plaintiffs two options. Either those members of the class who satisfy the requisite jurisdictional amount can waive their right to sue in federal court in order to maintain a single class action in state court or they can exercise their right to sue in federal court while the remaining class members sue in state court. If the latter option is taken, two identical and often complex class motions would be brought in two courts resulting in totally unnecessary burden and expense to both the parties and the state and federal courts.

In the cases to which amici curiae are parties in the District of Columbia, such duplication is not merely possible, but is inevitable. 11 D.C. Code 501(4) requires that suits for amounts in excess of $50,000 be filed in federal court until July, 1973. 11 D.C. Code 921(a)(2), however, requires that suits below that amount must be brought in the Superior Court for the District of Columbia. Thus, under the decisions of the Court of Appeals for the Second Circuit and the District Court for the District of Columbia, there is no choice but to bring two suits with identical causes of actions and identical requests for relief, based on the same course of conduct by identical defendants.

Such duplication of litigation serves no purpose. The reason for the jurisdictional amount requirement is to

reduce the litigation brought before federal courts by denying jurisdiction in cases involving small amounts of damages. It is questionable whether the decision below will accomplish this. If plaintiffs with damages over the jurisdictional amount decide not to waive their right to sue in federal court, the burden on the federal courts will remain constant while the state courts and the local courts of the District of Columbia will be needlessly burdened by additional litigation.

Moreover, while the decision of the Court of Appeals for the Second Circuit does not further the purpose of the jurisdictional amount requirement, it would have a disastrous impact on class actions. One of the historic uses of class actions is to enable those with small claims to band together when the individual amounts at stake make it impracticable to bring separate suit. Thus, the costs of suit would be absorbed by the entire class. If half the class must sue in one court and half in another, the costs are doubled and the financial burden may become so great that numerous litigants with small claims, or nonprofit organizations (like the amici curiae) representing such individuals, could not even contemplate bringing suit for redress of their grievances. This would be especially true with respect to consumer class actions where the legal issues are often difficult, the suits lengthy, and the costs enormous.

Furthermore, the decision of the Court of Appeals for the Second Circuit may even result in an inability to define any class. Having found that each plaintiff in a class action must have the jurisdictional amount, the district court concluded that it therefore followed that no class action, even limited to such plaintiffs, could be brought in federal court. It reasoned that no class could be ascertained, prior to trial on the issue of liability, without the appearance of each class member to substantiating his or her amount in controversy, and that

definition could not be postponed until after liability was determined without hopeless confusion. (Pet. at 47). This ruling would totally eliminate any class actions in federal court brought under statutes which have a jurisdictional amount. This ruling further demonstrates that the decision below is of far-reaching implications for major consumer litigation and, even more broadly, for use of class actions in the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully urge that the petition for a writ of certiorari should be granted.

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Senior Citizens
Consumer Federation of
America

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2198-71

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

WYETH LABORATORIES, *et al.*,
Defendants.

Civil Action No. 304-72

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

ELI LILLY AND COMPANY,
Defendant.

Civil Action No. 306-72

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

UPJOHN COMPANY,
Defendant.

MEMORANDUM AND ORDER

Before the court are the plaintiffs' motions for leave to amend the complaint and for reconsideration of the court's order transferring these civil actions to the Superior Court. Also before the court in Civil Actions No. 304-72 and 306-72 are the defendants' motions to disallow the amendment to the complaint adding Dade County as a plaintiff.

The principal issue raised by the defendants is whether the addition of parties plaintiff who meet the $50,000 jurisdictional amount will cure jurisdictional defects as to the original plaintiffs who do not meet that amount. The court is of the opinion that the weight of authority is against the plaintiffs who seek to use this device. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939); *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967); *Zahn* v. *International Paper Co.*, No. 71-2157 (2d Cir. Sept. 7, 1972).[1]

Since the court has determined that the addition of Dade County and the District of Columbia would not enable the present plaintiff to remain in this court as either plaintiffs or intervenors under the cases cited above, the court will not allow the amendments to the complaint since to do so would prevent transfer to Superior Court of these civil actions pursuant to D.C. Code § 11-922 (1967 Supp. V).

Therefore, it is this 19th day of October, 1972,

ORDERED:

1. That plaintiffs' motions for leave to amend and reconsideration are denied.

2. Defendant's motion to disallow the amendment to the complaint is granted.

3. The clerk is directed to transfer these civil actions to the Superior Court of the District of Columbia.

/s/ William B. Bryant
Judge

[1] The dissent in *Zahn* appears to be the better reasoned view, but in the circumstances the court feels that it is bound by the decided case.